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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1998

IZORA LIGGINS,

Petitioner,

v

MCDONNELL DOUGLAS CORPORATION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; LODGE 837 INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 837,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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39 pp

Questions Presented For Review

I. WHETHER THE PETITIONER SUBMITTED SUFFICIENT EVIDENCE TO OVERCOME THE STANDARD FOR A MOTION FOR SUMMARY JUDGMENT THAT THE EMPLOYER HARASSED, DISCRIMINATED AGAINST HER AND RETALIATED AFTER HER CONTINUOUS AND NON-RESPONSIVE COMPLAINTS WITH THE UNION?

II. WHETHER THE UNION FAILED TO REPRESENT PETITIONER IN A FAIR MANNER THEREBY BREACHING ITS FIDUCIARY DUTY?

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Opinions Below

The decision of the United States Court of Appeals for the Eighth Circuit is set forth in the Appendix, p. 1a . The opinion of the United States District Court for the Eastern District of Missouri dated December 8, 1997 is set forth in the Appendix, p. 5a. Both decisions are unreported.

Statement Of The Basis Of Jurisdiction Of The Supreme Court

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Eighth Circuit issued its Decision in this case on May 7, 1999. Panel rehearing and rehearing en banc were timely requested. Rehearing was denied on June 10, 1999. This Petition was timely filed within 90 days of the panel rehearing denial, and is thus timely.

Constitutional, Statutory And Ordinance Provisions Involved In This Case

Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. Section 2000e *et. seq.*

42 U.S.C. Section 2000e-2 provides:

Unlawful Employment Practices

Employer practices

It shall be an unlawful employment practice for an employer – to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's race, color, religion, sex or national origin...

Labor Management Relations Act, 29 U.S.C. Section 185, *et. seq.*

29 U.S.C. Section 185 provides:

Section 185. Suits by and against labor organizations.

(a) Venue, amount and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties...

STATEMENT OF THE CASE

Izora Liggins (hereinafter referred to as the "Petitioner") was employed by McDonnell Douglas Corporation (hereinafter referred to as the "Employer") from 1979 until April 1995 when she took disability retirement.

While at work, the Petitioner was racially and sexually harassed by the Employer and the Union.[1] The Employer retaliated against her for exercising her rights, took unwarranted disciplinary action against her, changed her shift

[1] International Association of Machinists and Aerospace Workers and its District Office 837

assignments for purposes of harassment, engaged in sexual harassment and deviated from its own policies, customs, and procedures, and unlawfully retaliated against her for exercising her lawful right to file a grievance. When she complained to the Union, the latter failed to properly represent her.

The Petitioner filed a complaint with the United States District Court Eastern District of Missouri against the Union and her Employer alleging violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. Section 2000e et. seq., by asserting claims of race and sex discrimination and retaliation.

The Employer and the Union filed a Motion for Summary Judgment which was granted on December 8, 1997.

The Petitioner filed a Notice of Appeal on December 16, 1997, to the United States Court of Appeals of the Eighth Circuit. The Court of Appeals affirmed the District Court's opinion.

The Petitioner has filed a Petition for Certiorari based upon the issues and argument presented herein.

ARGUMENT

I. THE PETITIONER SUBMITTED SUFFICIENT EVIDENCE TO OVERCOME THE STANDARD FOR A MOTION FOR SUMMARY JUDGMENT THAT THE EMPLOYER AND UNION DISCRIMATED AGAINST HER, RETALIATED AGAINST HER AND MISREPRESENTED HER.

Discrimination exists "in forms as myriad as the creative perverseness of human beings can provide." *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753-54 (5th Cir. 1980).

The Petitioner's case should have never been disposed of upon a summary judgment motion. The Petitioner by way of depositions, affidavits and other competent evidence showed a substantial and continuing hostile work environment; the race and sex discrimination commenced in 1993 and ended the date she terminated her employment. The Petitioner established a sufficient nexus between prior acts and allegations occurring within and without the limitation period.

Determinations of motive and intent, particularly in discrimination cases are questions better suited for the jury. *Petitti v. New England Telephone and Telegraph Co.*, 909 F.2d 28, 34 (1st Cir. 1990). Obviously, the Employer's and Union's motive and intent were central issues to the underlying cause of action – why they discriminated against her, retaliated against her and failed to properly process her grievances. Employment discrimination cases should be disposed of at summary judgment only with "extreme caution". *See Beard v. Annis*, 730 F.2d 741, 743 (11th Cir. 1984).

Discrimination can be proved with direct or indirect evidence. *Meeks v. Computer Data Association International*, 15 F.3d 1013, 1019 (11th Cir. 1994); including presenting a statistical pattern of discrimination. *Earley v. Champion International Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990).

The Petitioner showed a pattern of discriminatory actions and non-compliance by the Union. The Petitioner demonstrated that whenever she took an action against her Employer, the latter took adverse action against her, thereby establishing a pattern and connection between the two. *Evans v. Kansas City School District*, 65 F.3rd 98 (8th Cir. 1995), *cert. denied*, 134 L.Ed2 472, (1996). The District Court of Missouri stated in its decision that factors listed to establish a pattern of continuing violations include whether the acts involve the same jobs, co-workers and supervisors. *Alvey v. Rayovac Corporation*, 922 F.Supp. 1315, 1327-28 (1996).

In *Galloway v. General Motors Service Parts Operations*, 78 F.3rd 1164 (7th Cir. 1996), the court stated that an employee does not always know that he/she is being harassed. It is not necessary for a plaintiff to show that she was disciplined, fired, denied a raise, threatened, discharged, or given a negative evaluation. *Alvey, supra*, 1331. A Motion for Summary Judgment will be denied when a plaintiff realizes the act, complained of the discrimination and then the employer retaliated. *Id.*

When there is evidence of disparate treatment as well as other circumstantial evidence, there is sufficient evidence of proof of pretext discrimination; the evidence does not need to reach the degree of certainty required of plaintiffs who present no proof of discrimination besides disparate treatment. *Scott v. County of Ramsey*, 180 F.3d 913 (1999).

The Petitioner showed a pattern of discriminatory behavior both prior to and after her complaints with the union which meet her burden of proof to overcome a motion for summary judgment. *Smith v. St. Louis University*, 109 F.3d 1261 (8th Cir. 1997); *Harris v. Forklift System, Inc.*, 510 U.S. 17, 21 (1993). A statistical evidence of pattern of discrimination coupled with other evidence is a pretext for an employment discrimination case. *Bell v. Bolger*, 708 F.2d 1312 (1983). The statistical pattern is direct evidence that overcomes the standard for a motion for summary judgment. *See Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011(1999).

The Supreme Court has made employers vicarious liable for unlawful harassment. *See Burlington Industries Inc. v. Ellerth*, 118 St.Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998). The purpose of these previous ruling was to encourage employers to prevent harassment. However, in our facts, the Employer continued to harass the Petitioner and then retaliated once the latter complained. Retaliation was proven by the Employer's "tangible employment action", that is, the Petitioner's work assignment, undesirable reassignment, failure to promote. *Id., Ellerth, supra.*

The lower courts erred in stating that the Petitioner also waited too long to complain. However, reasonable explanations in the delay such as using the complaint mechanism entailed a risk of retaliation, there were obstacles to the complaint, and the complaint mechanism was not effective enough to defeat an employer's defense. *Id.* at 2292; EEOC: Enforcement Guidance: *Vicarious Employer Liability for Unlawful Harassment by Supervisory* (June 18, 1999).

This Honorable Court must grant this Petition for Certiorari so that it may clarify the standard when there is a pattern and history of discriminatory acts both before and after union grievances are attempted to be filed.

II. THE UNION FAILED TO REPRESENT PETITIONER IN A FAIR MANNER THEREBY BREACHING ITS FIDUCIARY DUTY.

A labor organization has the statutory duty of representing all members of the bargaining unit in utmost good faith and fairness. *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970), *citing, Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964); *Ford Motor Company v. Huffman*, 345 U.S. 3330, 3337, 73 S.Ct. 681, 97 L.Ed. 1048 (1953); Labor Management Relations Act, 29 U.S.C. Section 185.

Even though the Petitioner attempted to report the harassing behavior to her local union officials, they refused to process a grievance on her behalf alleging that the Petitioner did not have a contractual violation. The Union officials failed to act on the Petitioner's request for a grievance based upon her race and sex since the Union processed grievances for male employees and white employees who did not have a contractual violation. Furthermore, the local union officials just classified the Petitioner as a "troublemaker" and liar.

Furthermore, the union had a duty of fair representation that required that it exercise its discretion with "complete good faith and honesty". *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903 (1967).

The Union must be held liable since it failed to properly represent the Petitioner once she notified the Union of the discriminatory actions. Since the Eighth Circuit Court of Appeals has declined to extend liability when a union merely acquiesces in an employer's discrimination, *see Martin v. Local 1513 and District. 118 of the International Association of Machinists and Aerospace Workers*, 859 F.2d 581, 584 (8th Cir. 1998), this Court must give its opinion as to this issue and establish a burden of proof standard, that is how many acts or patterns have to be established.

Does not the mere acquiescence of a knowing pattern of harassment and retaliation justify a cause of action against the Union?

CONCLUSION

The Court should grant *certiorari* to review this important matter and reverse the Eighth Circuit and order that the Petitioner was discriminated against.

Respectfully Submitted,

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(Any footnotes trail end of each document)

No. 98-1579, No. 98-1726, No. 98-1966

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Izora Liggins,
Plaintiff-Appellant,

v.

International Association of Machinists and Aerospace Workers; Lodge 837 International Association of Machinists and Aerospace Workers, International Association of Machinists District 837; McDonnell Douglas Corporation,
Defendants-Appellees.

Izora Liggins, Plaintiff-Appellee,

v.

International Association of Machinists
and Aerospace Workers;
Defendant,

Lodge 837 International Association of Machinists and Aerospace Workers, International Association of Machinists District 837;
Defendant-Appellant,

McDonnell Douglas Corporation,

Defendant.

Izora Liggins,
Plaintiff-Appellee,

v.

International Association of Machinists and Aerospace Workers; Lodge 837 International Association of Machinists and Aerospace Workers, International Association of Machinists District 837;
Defendants,

McDonnell Douglas Corporation,
Defendant-Appellant.

March 9, 1999, Submitted
May 7, 1999, Filed

NOTICE: RULES OF THE EIGHTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

JUDGES: Before FAGG, HEANEY, and WOLLMAN, * Circuit Judges. HEANEY, Circuit Judge, dissenting.

* The Honorable Roger L. Wollman succeeded the Honorable Pasco M. Bowman as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the end of the day on April 23, 1999.

OPINION:

PER CURIAM.

Izora Liggins appeals the district court's adverse grant of summary judgment on a variety of employment-related claims in favor of McDonnell Douglas Corporation and Liggins's unions. Additionally, McDonnell Douglas Corporation challenges the district court's order that each party bear its own costs. Having reviewed the record and the parties' briefs, we see no error by the district court. We also conclude that an extended discussion is unnecessary in this fact-intensive case. We believe the district court correctly decided the issues, and we affirm without further discussion. See 8th Cir. R. 47B.

HEANEY, Circuit Judge, dissenting.

In my view the district court opinion ignores our recent decision in Rorie v. United Parcel Service, Inc., 151 F.3d 757, 762 (8th Cir. 1998), where under similar facts we reversed an adverse grant of summary judgment on the plaintiff's hostile work environment claim. Accordingly, I have no alternative but to dissent.

In Rorie, the plaintiff alleged that her supervisor repeatedly patted her on the back, brushed up against her, and told her that she smelled good. See id. at 759. We concluded that these allegations were sufficient for a jury to find that the plaintiff had been subjected to a hostile work environment. See id. at 762.

Liggins alleged the following behavior created a hostile work environment: her supervisor Tony Cartwright was overly friendly and made suggestive remarks about her clothes and hair. He asked her for dates several times and she rejected

him, responding that she was happily married. Her supervisor Carl Bowers winked at her, commented about her dress, stated that he liked the way she talked, followed her around the plant floor, rubbed her back at a meeting, and brushed up against her in the aisle. This behavior is at least as egregious as that in Rorie.

Here, the district court with minimal analysis held that Liggins' allegations of sexually harassing behavior by her supervisors did not establish conduct sufficiently severe and pervasive to alter the conditions of her employment and create an abusive working environment under Mentor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986). Rather, the district court characterized the alleged incidents as isolated or sporadic acts insufficient to state a claim of hostile work environment under Cram v. Lamson & Sessions Co., 49 F.3d 466, 474 (8th Cir. 1995). This was incorrect in light of Rorie, under which Liggins is entitled to remand for a jury trial on her claims. See 151 F.3d at 762.

Because Liggins presented sufficient allegations for a jury to determine that the behavior of her supervisors Cartwright and Bowers created a hostile work environment, I would remand for a trial on that narrow issue. Accordingly, I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IZORA LIGGINS,
Plaintiff

v.

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, et. al.,
Defendants.

No. 4:96-CV-483 (CEJ)

Filed December 8, 1997

MEMORANDUM AND ORDER

This matter is before the Court on the defendants' separate motions for summary judgment. See Fed. R. Civ. P. 56. Plaintiff Izora Liggins has filed a response in opposition to the motions.

Plaintiff Izora Liggins brings this action pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et sea. asserting claims of race and sex discrimination and retaliation.[1]

Liggins was employed by defendant McDonnell Douglas Corpora tion ("MDC") from 1979 until April 1995 when she took disability retirement. During her employment, plaintiff alleges that she was subjected to sexual harassment by her supervisor, Carl Bowers. Further, plaintiff asserts that

she was transferred on several occasions, being assigned to the second shift instead of the first shift which she preferred. Plaintiff states that she made complaints about her treatment, but she did not receive proper representation by union officials. Instead, according to plaintiff, defendants International Association of Machinists and Aerospace Workers ("IAMAW") and International Association of Machinists District 837 ("District 837") discriminated against her on the basis of her sex and race by refusing to process grievances against her employer. She also alleges that defendants IAMAW and District 837 retaliated against her for exercising her rights. Liggins further asserts that defendant MDC is liable for sexual harassment and for retaliation.[2]

Standard for Ruling on Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered "if the pleadings, deposi tions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment the court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underly ing facts. AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir. 1987). The moving party bears the burden of showing both the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586—87 (1986); Fed. R. Civ. P. 56(c). Once the moving party has met

its burden, the non-moving party may not rest on the allegations of his pleadings but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986).

Discussion

1. Retaliation Claim Against Defendants IAMAW and District 837

A plaintiff raising claims under Title VII must file an administrative charge with the Equal Employment Opportunity Commission ("EEOC") within 300 days of the discriminatory act. Kimzev v. Wal-Mart Stores. Inc., 107 F.3d 568, 572 (8th Cir. 1997). In this action, plaintiff filed the administrative charge against defendants IANAW and District 837 on June 23, 1995. Therefore, claims are actionable if they occurred on or after August 28, 1994. In the affidavit supporting the EEOC charge, Liggins claims that in April 1994, Shop Steward Bruskee threatened to file a "harassment charge" against her for asking the union to write grievances. This alleged act of retaliation occurred prior to August 28, 1994. As such, the retaliation claim exceeds the 300-day limitations period.

The limitations period may be tolled if plaintiff can show that there are other discriminatory acts occurring within the limitations period, sufficient to create a pattern of

continuing violations. Kimzev, 107 F.3d at 572-73. The plaintiff must establish a "sufficient nexus" between the acts that took place within the limitations period and acts that occurred outside of it. Koelsch V. Beltone Elec. Core., 46 F.3d 705, 707 (7th Cir. 1995). Otherwise, no pattern of continuing violations can be made. To establish the nexus, courts examine whether the acts involve the same jobs, co—workers, and supervisors. Houck v. City of Prairie Village, 1997 WL 625184, at *5 (D. Kansas 1997); Alvey v. Ravovac Corp., 922 F. Supp. 1315, 1327-28 (W.D. Wisc. 1996); Prendergast v. A. Sulka & Co.. Ltd., 1996 WL 617079, at *5 (N.D. Ill. 1996) (unreported decision). The amount of time between the prior acts and the acts within the limitations period is also a relevant factor. Prendergast, 1996 WL 617079, at *5.

In the affidavit supporting her EEOC charge of discrimination, plaintiff does not allege any other acts of retaliation occurring after the April 1994 incident. In the supplemental response to defendants' summary judgment motion, plaintiff alleges that Michael Schoen, a District 837 official, refused to process grievances in retaliation for plaintiff filing a complaint with the National Labor Relations Board in November 1994. Plaintiff points to deposition testimony of Schoen, in which he testified about his reaction to the National Labor Relations Board complaint. According to the plaintiff, the testimony reveals that Schoen was upset over the NLRB complaint, thereby creating a fact question that Schoen may have refused to process grievances as retaliation. The Court finds that plaintiff*s conclusions are speculative. In the excerpted portions of deposition testimony, Schoen did not admit that he acted in retaliation, nor did plaintiff*s counsel pose any question regarding possible retaliation. However, even if plaintiff submitted

competent evidence of retaliation, the Court finds an insufficient nexus between this incident and the April 1994 incident involving Bruske. The two incidents involved different supervisors, different departments, and the incidents took place eight months apart. As a result, plaintiff does not establish a continuing violation, and defendants IAMAW and District 837 are entitled to judgment on the claim of retaliation.

2. Failure to Process Grievances Claim Against Defendants IAMAW and District 837

When a bargaining unit employee asserts claims of race and sex discrimination against her employer, the union may also be held liable under certain circumstances. Marquart v. Lodge 837. Int'l Assoc. of Machinists and Aerospace Workers, 26 F.3d 842, 853 (8th Cir. 1994). Title VII prohibits a union from "help[ing] or encourag[ing) its employer to discriminate. at 853; 42 U.S.C. S 2000e-2 (c) (3) (union is liable for "caus(ing] or attempt(ing) to cause an employer to discriminate"). However, the Eighth Circuit has declined to extend liability when a union merely acquiesces in an employer's discrimination. Martin V. Local 1513 and Dist. 118 of the Int'l Assoc. of Machinists and Aerospace Workers, 859 F.2d 581, 584 (8th Cir. 1988) (citing Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)); Marquart, 26 F.3d at 853.

In this action, plaintiff alleges that her supervisor, Carl Bowers, committed acts of sexual harassment against her. Also, plaintiff asserts that she was transferred to different departments and placed on second shift instead of the preferred first shift. Plaintiff states that she complained to defendants IAMAW and District 837, but they

did not process any grievances on her behalf. Plaintiff claims that the defendants refused to process her grievances due to sex and race discrimination. Further, plaintiff asserts that the defendants are liable for their acquiescence in her employer's unlawful discrimination. As discussed above, acquiescence is not a cognizable basis for Title VII liability. Therefore, the Court will examine whether the defendants' actions were motivated by plaintiff's sex and/or race.

Title VII claims of sex and race discrimination proceed under the well-known McDonnell Douglas burden shifting framework.[3] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This framework requires the plaintiff to establish a prima facie case of discrimination. Roxas v. Presentation College, 90 F.3d 310, 315 (8th Cir. 1996). If a prima facie case is made, the defendant must produce evidence that it had a "legitimate, nondiscriminatory reason" for the employment action. at 316. The burden then shifts to the plaintiff to prove that defendant's reasons were a pretext for discrimination.

A prima facie case can be made if the plaintiff shows: 1) that she is a member of a protected group; 2) that she was qualified to receive requested assistance from the union; 3) that she did not receive requested assistance; and 4) that denial of assistance "occurred in circumstances giving rise to an inference of discriminatory motivation." See Thomas, 108 F.3d at 959 (citing Landon v. Northwest Airlines. Inc., 72 F.3d 620, 624 (8th Cir. 1995)); Roxas, 90 F. 3d at 315 (McDonnell Douglas framework is tailored to each individual case).

Defendants IAMAW and District 837 argue that plaintiff did not suffer any adverse action, because union

officials responded to her complaints. However, defendants did not provide the assistance requested by the plaintiff, i.e., processing grievances. The Court finds that failure to process grievances constitutes an adverse action, and the third prong of the prima facie case is satisfied.

On the fourth prong of the prima facie case, plaintiff does not make a sufficient showing with respect to defendant IAMAW. Plaintiff alleges that District 837 officials made discriminatory statements. However, plaintiff does not allege that any official of IAMAW made discriminatory statements regarding race or sex. Also, plaintiff does not point to any other circumstances that would give rise to an inference that IAMAW officials acted with a discriminatory motive. As such, plaintiff does not establish the fourth prong of the prima facie case, and defendant IAMAW is entitled to judgment on the race and sex discrimination claims.

With respect to claims against defendant District 837, plaintiff establishes the fourth prong of the prima facie case. Plaintiff asserts that District 837 officials made certain statements indicating a discriminatory motive. For example, on or about November 1993, the company transferred her from one depart ment to another and designated her to be on second shift instead of first shift. Plaintiff claims that her shop steward, Andy Fisher, refused her request to process a grievance and told her that "Black men have no place in management because they are trained to be dog catchers and are turned on other Black workers." The statement is somewhat vague in how it relates to plaintiff. Plaintiff is an African—American female, and the comment is a discriminatory statement against African—American males. However, the Court finds that the statement constitutes some

evidence of discriminatory motive on the basis of plaintiff's race.

Plaintiff also testified in deposition that Michael Schoen, a District 837 official, called her a "bitch" on one occasion. In response, District 837 contends that Schoen never made the statement and that plaintiff's allegation is contradicted by her past statements. According to plaintiff's affidavit, filed in support of her EEOC Charge, Schoen told an investigator from the National Labor Relations Board that plaintiff was at the union hall "having a Bitch session." Therefore, defendant asserts that even if Schoen used the term "bitch," it was used in the phrase "bitch session." Defendant argues that the term "bitch session" is a gender—neutral term to describe any individual making a complaint. The Court finds that there is question of fact whether Schoen called her a "bitch."

Statements allegedly made by Andy Fisher and Michael Schoen do not conclusively establish discriminatory motive. However, plaintiff has come forward with enough evidence to satisfy the fourth prong of the prima facie case. Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1109 (8th Cir.) (burden of establish ing prima facie case is "not onerous"), cert. denied, 513 U.S. 946 (1994). The Court concludes that plaintiff has established a prima facie case for sex and race discrimination against defendant District 837.

Defendant District 837 satisfies the second stage of the McDonnell Douglas framework by producing evidence of a legitimate, nondiscriminatory reason for its actions. As discussed above, plaintiff requested grievances regarding the company's transfer decisions and the alleged acts of harassment by supervisor Carl Bowers. District 837 Plant

Chairman Jim Yoakum addressed the issue of the transfers in a memorandum dated November 10, 1994. Yoakuin stated that plaintiff had been transferred several times and that the company had been "messing" with her. However, he did not assert that the terms of the union contract were violated or that decisions were motivated by discriminatory reasons. In fact, Yoakum stated that every transfer was made "within the contract" and plaintiff did not have a valid grievance. Therefore, defendant District 837 has produced evidence that it investigated the transfer decisions, found no violations of the union contract, and found no grounds to process grievances.

As evidence of pretext, plaintiff points to one incident on or about September 1993. According to the plaintiff, the company planned to put her on second shift duty, allegedly in violation of her seniority rights. Shop steward Andy Fisher refused to provide assistance, and a black shop steward, Stuart Coleman[4], stepped in to point out the rules violation and have the decision reversed. The Court finds that the decision was reversed before the transfer decision was completed. Therefore, plaintiff suffered no adverse action. Because this transfer decision was never taken into effect, the Court finds that the incident does not contradict Yoakum's findings that all transfers were done within the rules of the contract.

Further, plaintiff points to deposition testimony of Stewart Coleman. Coleman testified his belief that only the plant chairman and not shop stewards has the discretion to decide whether to process grievances. Because plaintiff's shop stewards did not process grievances, plaintiff claims that she did not have a fair investigation. However, as discussed above, Plant Chairman Yoakum conducted an investigation.

Yoakum found no contract violations and exercised his discretion not to process grievances. Coleman also testified that it was his general belief that African-American employees were unfairly treated. However, Coleman stated that he could not point to any evidence to support his general belief. More importantly, Coleman did not testify that any of plaintiff's transfers actually carried out were in violation of the contract. Finally, Coleman admitted that once the transfers were completed, plaintiff was the "junior" person and could be assigned to the second shift. As a result, Coleman's deposition testimony does not provide evidence that Yoakum's investigation was incorrect.

Plaintiff next points to deposition testimony of shop steward Steven Bruske. Bruske testified that the union contract required all transfers to be completed for "just cause." According to the plaintiff, Bruske also testified that the just cause requirement carried a potential for abuse and that the company made transfers for improper purposes. Upon examination of Bruske's deposition testimony, the Court finds that the plaintiff mischarac terizes Bruske's testimony. Bruske testified that there was a possibility for abuse of the just cause requirement, but he also testified that he had no specific knowledge of any instance where the company carried out a transfer in violation of the union contract. Plaintiff alleges that Bruske allowed plaintiff to be "forced" on second shift while allowing two white males to obtain first shift. However, plaintiff does not point to any evidence that plaintiff's seniority status gave her right to be on first shift over those two individuals. Finally, plaintiff testified in her deposition that Bruske acted in an "offensive and abusive" manner toward her. Plaintiff does not point to any statements or actions that specifically reveal motivation on the basis of her race or sex.

Plaintiff does not establish pretext by pointing to discriminatory statements allegedly made by District 837 business representative Cassell Williams, District 837 official Mike Schoen, District shop steward Andy Fischer, and co—worker Tom Preston. The statements do not specifically show that Yoakum's investigation and findings were flawed.

Finally, plaintiff does not establish pretext by use of statistics. In her supplemental response to defendants' summary judgment motion, plaintiff alleges that only 7% of the grievances processed were done on behalf of female union members. First, this data does not reveal anything about possible race discrimination. Second, the data does not specifically show that Yoakum's investi gation and findings were flawed. Plaintiff does not establish that District 837 actions regarding the transfer decisions were mere pretext for race and sex discrimination.

Similarly, on the issue of grievances for sexual harass ment, District 837 has produced evidence of a legitimate, nondis criminatory reason for its actions. In the memorandum dated November 10, 1994, Yoakum investigated the allegations of sexual harassment. He recommended that the plaintiff be separated from the alleged harasser, Carl Bowers. After this proposed transfer, he recommended that she not be subject to further transfers. Also, Mary M. Andrews, District 837 Business Representative, investigated the sexual harassment allegations. She reported her findings to Warren L. Mart, a District 837 official, in a memorandum dated February 3, 1995. Andrews reported that she found "no actual contract violations," but she would "make every effort to have Sister Liggins transferred." She noted that there was nothing she

could do until Liggins returned from medical leave. In a memorandum to Mart, dated June 29, 1995, Andrews reported that Liggins would be transferred "where she would feel more comfortable working." However, Andrews reiterated that nothing else could be done until plaintiff returned to work.

Yoakum and Andrews did not process grievances on the sexual harassment issue. However, Yoakum and Andrews conducted investiga tions and secured a transfer away from plaintiff's alleged harasser, if plaintiff had returned from medical leave. The Court finds that District 837's investigation provided a legitimate, nondiscriminatory reason for not processing grievances. If plaintiff had returned from medical leave instead of taking disability retirement, District 837 could have implemented the transfer decision. Plaintiff does not establish evidence that District 837's investigation was a mere pretext for race and sex discrimination.

3. Sexual and Racial Harassment Claims Against Dfendants IAMAW and District 837

To the extent that plaintiff raises separate claims of sexual and racial harassment against defendants IAMAW and District 837, the Court finds that the defendants are entitled to judgment.[5] Plaintiff alleges that District 837 official Tom Preston on one occasion suggested to an MDC employee that Liggins was "sleeping with" a co-worker. She also asserts that Preston asked an employee whether he was "sleeping with" the plaintiff. Plaintiff claims that District 837 official Mike Schoen called her a "bitch" on one occasion. Shop steward Andy Fischer allegedly told her on one occasion that black men do not make good managers. Finally,

plaintiff contends that District 837 business representative Cassell Williams told her on one occasion that expediting (i.e., job category held by plaintiff) was reserved for white union members and children of management. Even if all of these statements were made, the Court finds that plaintiff has not shown conduct that is sufficiently "severe and pervasive ... to alter the conditions of the victim*s employment and create an abusive working environment." Mentor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). Rather, the alleged statements were at most isolated or sporadic acts that are insufficient to make a claim of hostile work environment. Cram v. Lamson & Sessions Co., 49 F.3d 466, 474 (8th Cir. 1995). Moreover, as discussed above, plaintiff has not shown that the transfer decisions were motivated by sex or race consider ations. Therefore, the transfer decisions do not constitute evidence of sexual and racial harassment. Accordingly, defendants IAXAW and District 837 are entitled to judgment on claims of sexual and racial harassment.

4. Sexual Harassment Claim Against Defendant MDC

On March 11, 1994, plaintiff filed an EEOC Charge and a supporting affidavit against defendant MDC in which she alleged that acts of sexual harassment were committed by supervisors Carl Bowers and Tony Cartwright. The 300-day limitations period bars allegations of incidents occurring prior to May 15, 1993. However, plaintiff seeks to include other incidents outside of the limita tions period under the continuing violations theory.

Plaintiff claims that she was sexually harassed by her second—line supervisor in 1979 when she worked for

MDC as a data entry clerk. Plaintiff points to alleged acts of harassment by another supervisor beginning in 1984. At the time, plaintiff worked as a stock-keeper. Also, plaintiff alleges that a female co-worker harassed her in an MDC facility in St. Charles County, Missouri. The Court concludes that all of these events occurred, if at all, beyond the limitations period. Furthermore, these earlier acts involve different job positions at different locations, different supervisors, and different co—workers. Therefore, there is an insufficient nexus between the prior acts and the allegations occurring within the limitations period. Houck, 1997 WL 625184, at *5; Alvey, 922 F. Supp. at 1327—28; Koelsch, 46 F.3d at 707. The prior acts are not part of a continuing violation and they are time-barred.

Plaintiff makes several allegations of sexual harassment by supervisory personnel occurring within the limitations period. First, she alleges that Jim Wilson, Lloyd Peters, Ray Merriam, Ken Spralding (an MDC official not plaintiff's supervisor) committed acts of harassment against her. However, plaintiff does not submit evidence showing that any of the acts were committed on the basis of her sex. Kipp v. Samaritan Health Sys.. Inc., 13 F.3d 264, 269 (8th Cir. 1993).

Plaintiff also points to acts allegedly committed by supervisor Tony Cartwright. In her affidavit supporting the EEOC charge, plaintiff made the following statements:

> He on several occasions asked me for dates. I informed him that I was happily married.... Mr. Cartwright was always telling me that he was a ladies man and that people in the building probably thought we were dating. I

> told him that I didn't date and the people in the building who knew me knew that. After Mr. Cartwright and I came under agreement that I was not interested in him, we were able to get to work.

In a subsequent deposition, plaintiff testified that the harassment did not stop. Plaintiff testified that Cartwright "started to write me up" after learning that she was not interested in dating him. The Court concludes that plaintiff's deposition testimony regarding Cartwright's alleged actions in "writing up" the plaintiff cannot be considered as evidence of sexual harassment. Plaintiff's prior sworn affidavit makes it clear that Cartwright ceased committing acts of harassment after plaintiff refused his offer to start dating. Therefore, plaintiff's subsequent contradictory deposition testimony does not constitute competent evidence of harassment. Bank of Illinois v. Allied Sianal Safety Restraint Sys., 75 F.3d 1162, 1168—69 (7th Cir. 1996). Depositi&n testimony is not competent evidence when it contradicts prior statements made under oath. Id. (deposition testimony contradicted prior testimony at child custody hearing and prior answers to defendant's interrogatories).

Plaintiff makes several allegations of sexual harassment against her supervisor Carl Bowers. Beginning in August 1993, plaintiff was assigned to be under the supervision of Carl Bowers. Plaintiff asserts that Bowers began to sexually harass her starting in October 1993. She claims that Bowers winked at her approximately once a day when walking through the department, rubbed her on the back on one occasion, sat next to her during meetings, "stared" at her at least once a week[6], once made a comment that he "loved the way (she] talked," and once commented

that he "really like(d] (her) earrings." Plaintiff also asserts that Bowers "followed her" to a bar after work on one occasion in December 1993. Plaintiff testified in deposition that Bowers sat down at the same table as plaintiff and her friends. Bowers did not talk to plaintiff and then left after approximately 45 minutes. Plaintiff also testified that she left the table immediately after Bowers sat down, in order to compose herself. However, she returned after approximately 5 minutes and sat back down at the table with Bowers and others.

In addition, plaintiff asserts that Bowers committed harassment by transferring her to the second shift and to other departments. In August 1993, plaintiff was scheduled to be put on the second shift. This transfer was never completed. In December 1993, plaintiff was transferred to another department and was put on the second shift. Plaintiff attributes this incident to Bowers' harassment, but defendant MDC submits evidence that the plaintiff requested a transfer on November 24, 1993. Moreover, plaintiff does not submit evidence that seniority rules were violated by her assignment to the second shift.

Finally, plaintiff claims that Bowers harassed her by directing Cartwright to "write her up" for two disciplinary actions, for poor work attendance and for causing a distraction to other employees. However, in deposition testimony, plaintiff admitted that she missed too many days. Therefore, at least with regards to the attendance action, the disciplinary action had a basis in fact.

Upon examination of the record, the Court concludes that the plaintiff has not established conduct that is sufficiently "severe and pervasive ... to alter the conditions of

the victim*s employment and create an abusive working environment." Meritor, 477 U.S. at 67. Rather, the alleged actions of Bowers and Cartwright were isolated or sporadic acts insufficient to make a claim of hostile work environment.. Cram, 49 F.3d at 474.

5. Retaliation Claim Against Defendant MDC

An employer may not retaliate against an employee for bringing a charge of employment discrimination. 42 U.S.C. S 2000e- 3(a); West v. Marion Merrell Dow. Inc., 54 F.3d 493, 496 (8th Cir.1995). To succeed on a claim of retaliation, the plaintiff must prove that she brought a charge of discrimination and, as a result, an adverse employment action was taken against her. Id. at 497. Once the plaintiff has established her prima fade case, the burden shifts to the employer to articulate a legitimate, non discrimindtory reasons for the action. Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980), cert. denied, 450 U.S. 979 (1981); Caleshu v. Merrill Lynch. Pierce. Fenner & Smith. Inc., 737 F. Supp. 1070, 1081 (E.D. Mo. 1990), aff'd, 985 F.2d 564 (8th Cir. 1991). If the employer articulates a non- discriminatory reason for the action, the plaintiff must then show that this reason is a pretext for discrimination. Jackson v. Missouri Pacific R.R., 803 F.2d 401, 407 (8th Cir. 1986).

In this case, the defendant argues that it is entitled to summary judgment on the retaliation claim because the plaintiff has failed to show that any adverse employment action was taken against her. In response, plaintiff alleges negative actions such as transfer decisions, negative performance evaluations, being "written up" for disciplinary actions, verbal abuse, and being "followed

around" by an MDC employee as harassment. She also asserts that some unknown employee(s) placed a wooden cross on her desk with the inscription "The KKK Wants You."

Transfer decisions that involve "minor changes" and do not involve a "demotion in form or substance" are not materially adverse employment actions. Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997). Plaintiff complains about being moved from the first shift to the second shift following the transfer decisions. However, she does not establish how such transfers caused a reduction in pay or benefits, or otherwise cause more than minor changes. Id., Daub v. Commonwealth Edison, 938 F. Supp. 1388, 1397 (N.D. Ill. 1996) ("transfer to another shift, after spending years on a different shift, could be very disruptive").

Negative job evaluations standing alone do not constitute an adverse employment action. Montandon v. Farmland Indus.. Inc., 116 F.3d 355, 359-60 (8th Cir. 1997). A negative evaluation is an adverse action if it is actually "used as the basis for any action" against the employee. In this case, plaintiff does not show that a negative job evaluation was used as the basis for any action taken against her. Similarly, plaintiff does not establish that being "written up" for disciplinary actions constituted an adverse action. She does not point to any loss in pay, benefits, or other change that resulted from the disciplinary actions.

"Hostility" and "personal animus" toward an employee do not standing alone establish an adverse employment action. Manning v. Metropolitan Life Ins.. Co.. Inc., 1997 WL 624825, at *6 (8th Cir. 1997). An employee

must submit evidence of some "tangible change in duties or working conditions that constituted a material employment disadvantage."Plaintiff alleges that certain employees subjected her to verbal abuse and that she was "followed around" by one co-worker. She also asserts that some unknown employee(s) placed a wooden cross on her desk with the inscription "The KKK Wants You." However, she does not submit evidence of a tangible change that resulted any of this conduct. As such, no adverse action has been established.

Because plaintiff cannot establish any adverse action resulting from the alleged acts of retaliation, defendant MDC is entitled to judgment on the retaliation claim.

For reasons stated above,

IT IS HEREBY ORDERED that the motion for summary judgment filed by defendant International Association of Machinists and Aerospace Workers is granted [Doc. 63].

IT IS FURTHER ORDERED that the motion for summary judgment filed by defendant International Association of Machinists District 837 is granted [Doc. 64).

IT IS FURTHER ORDERED that the motion for summary judgment filed by defendant McDonnell Douglas Corporation is granted (Doc. 77). An appropriate order will accompany this Memorandum and Order.

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this _____ day of December, 1997.

Footnotes

[1]On May 19, 1997, the Court granted summary judgment in favor of the defendants on claims brought under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

[2]In response to defendant MDC*s summary judgment motion, plaintiff raises a claim of conStructive discharge. However, plaintiff did not raise a claim of constructive discharge in her first amended complaint. Also, plaintiff did not obtain leave of Court to raise this new claim. Therefore, the claim of construc tive discharge is not part of the present case.

[3]Plaintiff does not allege direct evidence of discrimination to invoke the mixed motives framework of Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

[4]Plaintiff alleges that Stuart Coleman was a shop steward at the time of the incident. He also served as a plant chairman for District 837. Defendants do not dispute this.

[5]Plaintiff raised the harassment claims in her first amended complaint.

[6]Plaintiff points to her deposition testimony that Bowers continued to stare at her and intimidate her even after plaintiff was transferred to another department. However, in deposition testimony, the plaintiff did not allege having any contact with Bowers in her new department. She only alleges that Bowers was occasionally present in the department.

No. 98-1579, No. 98-1726, No. 98-1966

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Izora Liggins,
Plaintiff-Appellant,

v.

International Association of Machinists and Aerospace Workers; Lodge 837 International Association of Machinists and Aerospace Workers, International Association of Machinists District 837; McDonnell Douglas Corporation,
Defendants-Appellees.

Izora Liggins, Plaintiff-Appellee,

v.

International Association of Machinists
and Aerospace Workers;
Defendant,

Lodge 837 International Association of Machinists and Aerospace Workers, International Association of Machinists District 837;
Defendant-Appellant,

McDonnell Douglas Corporation,
Defendant.

Izora Liggins,
Plaintiff-Appellee,

v.

International Association of Machinists and Aerospace Workers; Lodge 837 International Association of Machinists and Aerospace Workers, International Association of Machinists District 837;
Defendants,

McDonnell Douglas Corporation,
Defendant-Appellant.

June 10, 1999 Filed

ORDER DENYING REHEARING

The petition for rehearing is hereby denied.

s/Clerk